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**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA**

11 JAMES M. KINDER,) Case No. 07 CV 2132 DMS (AJB)
12 Plaintiff,)
13) Judge: Hon. Dana M. Sabraw
14 v.) Mag. Judge: Hon. Anthony J. Battaglia
15 NATIONWIDE RECOVERY SYSTEMS,)
16 LTD. and DOES 1 through 100, inclusive,)
17 Defendants.)
18)
19)
PLAINTIFF JAMES M. KINDER'S
OPPOSITION TO DEFENDANT'S
MOTION FOR PARTIAL JUDGMENT
ON THE PLEADINGS;
MEMORANDUM IN SUPPORT
THEREOF
Date: January 22, 2008
Time: 10:30 a.m.
Courtroom: 10

I. INTRODUCTION

21 TO THE COURT, ALL PARTIES AND THEIR ATTORNEYS OF RECORD: PLEASE
22 TAKE NOTICE THAT Plaintiff JAMES M. KINDER hereby opposes Defendant
23 NATIONWIDE RECOVERY SYSTEMS, LTD.'s Motion for Partial Judgment on the Pleadings,
24 for the reasons set forth below.

26 //

II. ARGUMENT

A. IN ORDER FOR THE TCPA TO HAVE ANY EFFECT, THIS COURT MUST FIND THAT THERE IS A PRIVATE RIGHT OF ACTION FOR VIOLATIONS OF 47 C.F.R. §64.1200 (b)(1) AND 47 C.F.R. §64.1200 (b)(2)

1. **Defendant's Interpretation Of The Statutory Scheme Encourages Violations Of The Telephone Consumer Protection Act [TCPA] And 47 C.F.R. §64.1200, Renders The TCPA Entirely Ineffective And Makes It Easier For TCPA Violators To Escape Liability.**

The Telephone Consumer Protection Act, in addition to other laws was passed to address
8 a national epidemic of out of control autodialers and deceptive prerecorded and artificial voice
9 messages that invaded the privacy of millions of Americans each day. In FCC Report and Order
10 03-153, paragraph 165, the FCC noted that “Congress found that automated or prerecorded
11 telephone calls were a...nuisance” and an “invasion of privacy.” The Commission further noted
12 that telemarketing calls had increased from about 18 million per day in the United States in 1991,
13 to approximately 104 million per day in the United States in 2003. The proliferation of invasive
14 and offensive autodialed, prerecorded and artificial voice calls in the United States caused
15 Congress to pass the Telephone Consumer Protection Act of 1991. Pursuant to the ameliorative
16 goals pursued by Congress when it passed the TCPA, the FCC adopted a number of Regulations
17 related thereto to further those same laudable goals.

22 Among the Regulations adopted by the FCC to enhance the TCPA's effect were 47
23 C.F.R. §64.1200 (b) (1) and 47 C.F.R. §64.1200 (b) (2). Those regulations require that, any time
24 a person or entity makes a prerecorded or artificial voice message call, the beginning of the
25 message must give the proper name of the person or entity making the call and, during or after

1 the message, the person or entity must leave its telephone number. 47 C.F.R. §64.1200 (b) (1);
2 47 C.F.R. §64.1200 (b) (2), respectively. The reasons for these requirements are clear. The
3 Regulations were adopted so that unscrupulous scofflaws disseminating thousands of calls to
4 innocent consumers would be identifiable. If it were not for these regulations, collection
5 agencies and telemarketers could disseminate a constant tidal wave of anonymously autodialed
6 and prerecorded/artificial voice calls to thousands of innocent consumers without consequence,
7 just as they did prior to enactment of the TCPA. This is because, when a TCPA violator fails to
8 leave its name or telephone number, it is much more difficult, if not impossible, for victims to
9 figure out who called them. Therefore, if it were not for 47 C.F.R. §64.1200 (b) (1) and 47
10 C.F.R. §64.1200 (b) (2), TCPA victims would have almost no way to sue for TCPA violations
11 because they would not know who to sue.

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15 By giving TCPA victims a private right of action with minimum statutory damages of
16 \$500 per violation, Congress made the TCPA a consumer-friendly, victim-enforcing statute. The
17 idea was to make it easy for victims to bring actions in Small Claims Court [or similar tribunals],
18 without the need for hiring an attorney, to recover statutory damages for TCPA violations.
19 Without 47 C.F.R. §64.1200 (b) (1) and 47 C.F.R. §64.1200 (b) (2), victims have no way of
20 knowing who it is who has called them because there would be no incentive for TCPA violators
21 to identify themselves. Under Defendant's construction of the statutory scheme, all a collection
22 agency or telemarketing firm would have to do to avoid liability under the TCPA is secret its
23 identity. And, this could be done at no economic risk because there is no private right of action
24 for individual consumers for the Code of Federal Regulations identification requirements.
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2. There Is A Consensus Among State Courts Around The Country That There Is A Private Right Of Action For Violations Of The TCPA's Technical And Procedural Standards Found In The Code of Federal Regulations.

19 State courts in New Jersey, Colorado, Ohio, Missouri and South Carolina have all
20 determined that there is a private right of action for violations of the technical and procedural
21 requirements associated with the TCPA found in the Code of Federal Regulations.

24 See, Sterling Realty Co. v. Klein, 2005 TCPA Rep. 1353 (N.J. Super. Mar. 21, 2005);
25 McKenna v. Accurate Comp. Svcs., Inc., 2002 TCPA Rep. 1135 (Colo. Dist. Feb. 24, 2003);
26 Bailey v. Drummond, 2004 TCPA Rep. 1373 (Colo. D.C. Dec. 29, 2004); Mathemaesthetics, Inc.

1 v. Lassiter Mktg. Group, LLC, 2002 TCPA Rep. 1061 (Colo. Dist. June 6, 2002); Charvat v.
 2 Ryan, 2006 TCPA Rep. 1480 (168 Ohio App.3d 78, 858 N.E.2d 845); Charvat v. Foley, 2006
 3 TCPA Rep. 1449 (Ohio C.P. May 8, 2006); Charvat v. Health Care Plan of America, Inc., 2007
 4 TCPA Rep. 1534 (Ohio C.P. March 16, 2007); Charvat v. Konah Ind., LTD, 2005 TCPA Rep.
 5 1681 (Ohio C.P., Sep. 13, 2005); Charvat v. Telelytics, LLC, 2006 TCPA Rep. 1488 (2006 Ohio
 6 4623, Ohio App. 2006); Schraut v. Rocky Mtn. Reclamation, 2001 TCPA Rep. 1182 (Mo. Cir.
 7 Dec. 18, 2007); Agostinelli v. Roberts Mortg. Co., 2002 TCPA Rep. 1054 (S.C. Magis. Mar. 25,
 8 2002).
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11 **3. State Court Jurisdiction Of TCPA Matters Is Exclusive And Therefore**
 12 **Deference Should Be Given To States' Courts' Construction Of The TCPA**
 13 **And Related Sections Of The Code Of Federal Regulations.**

14 Although this case was removed to this Court by Defendant based on grounds of diversity
 15 of citizenship, it was originally filed in San Diego Superior Court. That is because, although the
 16 TCPA is a federally created act, jurisdiction over TCPA cases is exclusive to State courts, except,
 17 possibly, in situations of diversity of citizenship.¹ The fact that State court jurisdiction of TCPA
 18 matters is exclusive is obvious based on the plain language of the TCPA. **“Private right of**
 19 **action** – A person may, if otherwise permitted by the laws or rules of court of a State, **bring in**
 20 **an appropriate court of that State** – (A) an action based on a violation of this subsection or the
 21 regulations prescribed under this subsection...” [Bolding, underlining added for emphasis.] 47
 22 U.S.C. § 227 (b)(3).
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27 1 Although Plaintiff has not brought a Motion for Remand in this case, he reserves the right to do so at a later date.
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1 Moreover, it is well settled among courts around the United States that there is exclusive
 2 State court jurisdiction over TCPA claims brought under the private right of action. “The
 3 legislative history and purpose of the TCPA support the view that Congress intended to confer
 4 exclusive jurisdiction on state courts over private rights of action...Although over forty state
 5 legislatures had enacted measures restricting unsolicited telemarketing, these measures had
 6 limited effect because states do not have jurisdiction over interstate calls.” *Foxhall Realty Law*
 7 *Offices, Inc. v. Telecom. Prem. Serv.*, (2d Cir. 1998) 156 F. 3d 432, 437.

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 10 “*The TCPA is unusual in that it gives state courts exclusive jurisdiction over private*
 11 *rights of action [conferred by federal law] and limits [f]ederal court jurisdiction to civil actions to*
 12 *enforce the TCPA brought by attorneys general or the Federal Communications Commission.”*
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 14 *Kaufman v. ACS Systems, Inc.*, 110 Cal.App.4th 886, 897, 2 Cal.Rptr.3d 296 [citing *Schulman v.*
 15 *Chase Manhattan Bank*, (2000) 268 A.D.2d 174, 178, 710 N.Y.S.2d 368, 371.]. “At least six
 16 federal circuit courts have reached ‘the somewhat unusual conclusion that state courts have
 17 exclusive jurisdiction over a [private] cause of action created by’ a federal statute[, the TCPA].”
 18
 19 *Id.* [citing *Murphey v. Lanier*, (9th Cir.2000) 204 F.3d 911, 915.] “Apparently recognizing that
 20 the exclusivity of state court jurisdiction could create a problem.... Congress avoided any
 21 constitutional issue by refusing to coerce states to hear private TCPA actions, providing instead
 22 that a person or entity may, ‘*if otherwise permitted by the laws or rules of court of a State,*’ bring
 23 a TCPA action in an appropriate court of that state...States thus retain the ultimate decision of
 24 whether private TCPA actions will be cognizable in their courts.”” *Intern. Science & Tech.*
 25
 26 *Institute v. Inacom Comm.*, (4th Cir.1997) 106 F.3d 1146, 1156-1158 [italics added.]. “States

1 have been given, *subject to their consent*, exclusive subject matter jurisdiction over private
 2 actions authorized by the Telephone Consumer Protection Act of 1991..." *Id* at p. 1150 [italics
 3 added]; *accord, Foxhall Realty Law Office, Inc. v. Telecom. Prem. Serv.*, *supra*, 156 F.3d at pp.
 4 435-438; *Murphy v. Lanier*, *supra*, 204 F.3d at pp. 913-915.
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7 It only stands to reason that, because Congress went out of its way to show deference to
 8 the way States choose to handle [or not handle, if they decide to opt out of the TCPA] TCPA
 9 cases, this Court should show deference to how State courts from around the country have
 10 recognized a private right of action for violations of the Code of Federal Regulations. It is telling
 11 in this regard that Defendant has cited no authority from any State court for its position that there
 12 is no private right of action for violations of 47 C.F.R. §64.1200.
 13

14 **III. CONCLUSION**

15 For all of the reasons stated above, Plaintiff respectfully requests that this Court deny
 16 Defendant's Motion for Partial Judgment on the Pleadings, give the Telephone Consumer
 17 Protection Act its proper remedial construction, consistent with enforcement of its provisions,
 18 and hold Defendant accountable for its unlawful conduct.
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20 DATED: January 8, 2008

21 By: /s/ Chad Austin
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